No. 11733

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

J. H. GALLAGHER, J. IRA MCNUTT, AND EARL L. MCNUTT, APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The district court wrote a memorandum opinion (R. 41); and its findings of fact, conclusions of law and judgment are set out at R. 46–54.

JURISDICTION

The judgment of the district court was entered on April 4, 1947 (R. 54). The United States filed a motion for new trial and for amendment of findings of fact, conclusions of law and judgment on April 11, 1947 (R. 55–60), which was denied by the court on May 22, 1947 (R. 61). The United States filed notice of appeal on August 19, 1947 (R. 62). The jurisdiction of the district court was invoked under the Act of

March 3, 1887, c. 359, secs. 1, 2, 24 Stat. 505, as amended; 28 U. S. C. sec. 41 (20), commonly known as the Tucker Act (R. 2). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTIONS PRESENTED

1. Whether the judgment rendered in a condemnation case in which the parties stipulated that the value of an entire road should be determined therein, and the jury returned a verdict for the value of the entire road, precludes the owners of the road from recovering in this action for the reasonable and fair market value of the use of a portion of the road.

2. Whether the trial court erred in rendering a judgment based on the cost of construction of the entire road, less the amount previously received for its use, as the reasonable and fair market value of the use of one-third of the road, rather than basing it on the reasonable charge per cubic yard for such use.

STATEMENT

This appeal is from a judgment in suit brought under the Tucker Act in favor of appellees for $5,816 based on the cost, less sums and credits previously received, of a certain private road owned by appellees but used by the United States for hauling sand and gravel in army trucks and other conveyances (R. 2–22, 54).

The facts of the case may be summarized as follows: [1]

[1] The facts were agreed upon in a pre-trial conference on which an order was entered on March 19, 1947 (R. 32–40). This pre-trial

On April 11, 1942, appellee Gallagher entered into an agreement with Crown Zellerbach Corporation (R. 5–16, 48), in which he was granted, for a period beginning on that date and ending December 31, 1945, the right to take sand and gravel from Santiam Bar, which was owned by Crown Zellerbach Corporation. He was granted the further right to construct a private road upon its premises adjacent to the gravel bar for the purpose of transporting to market the sand and gravel produced. As part consideration for the sand and gravel purchased, this road was to be available to Crown Zellerbach Corporation and any other purchasers of sand and gravel from it, Gallagher to be reimbursed by the user on some reasonable basis for the use of the road, "such reimbursement to be at a reasonable royalty rate on a per cubic yard basis which would not be greater than a fair share or proportionate cost of constructing and maintaining such private road or roads" (R. 8). On April 13, 1942, Gallagher entered into an agreement with J. Ira McNutt and Earl L. McNutt (R. 17–22, 48), whereby Gallagher agreed to do certain things and the McNutts, among other things, agreed to install bunkers, machinery, and equipment on the gravel bar and to process sand and gravel from the bar. In order to construct the private road from the gravel bar to a public highway, it was necessary to procure easements across two pieces of intervening property, one owned by A. W. Crocker, the other by L. M. Gossler (R. 34, 35, 127). The road when completed was 1.8 miles

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order was amended by the court, on its own motion, in paragraph V of its Conclusions of Law (R. 54).

long, six-tenths of a mile being on the property of Crown Zellerbach Corporation (R. 130–131).

Between May 9, 1942, and June 20, 1942, appellees processed, washed, screened, and stock-piled and were the owners of 13,743 cubic yards of sand and gravel, which was then situated upon the Santiam Bar; between May 9, 1942, and October 1, 1942, they sold and removed 3,740 cubic yards of same over their road; and between July 1, 1942, and September 16, 1942, Strong and McDonald paid plaintiffs $3,000 for the use of their road in moving 68,203 cubic yards of sand and gravel from Santiam Bar (R. 37, 51).

On November 18, 1942, Crown Zellerbach Corporation granted permission to the Government to remove sand and gravel from the Santiam Bar with the understanding that Gallagher's rights under their agreement of April 11, 1942, would be protected (R. 38, 51–52, 72–73). Between October 1, 1942, and August 19, 1944, the Government moved 66,643 cubic yards of sand and gravel over appellees' roadway from the Santiam Bar to Camp Adair (R. 37, 51).

In 1942, the United States condemned the land owned by Gossler and Crocker over which the road ran (R. 49, 50). The condemnation of the Gossler tract was tried beginning November 21, 1944, before Honorable James Alger Fee and a jury, the style of the case being *United States of America* v. *L. M. Gossler et al.,* Civil No. 1729, J. H. Gallagher and his wife being made parties defendant, and the McNutt Brothers intervening. The purpose of that trial was to assess the value of the Gallagher and McNutt interests in the Gossler land (R. 75). At that time,

a stipulation was entered into by all parties that they would try in that lawsuit the value of the entire road and the interest of Gallagher and the McNutts in the gravel bar (R. 36–37, 76–77). The court instructed the jury that the United States is required to pay just compensation for the interests of these parties (R. 77, 120). On November 24, 1944, the jury returned the following verdict (R. 84, 116–117):

> We, the jury, duly empaneled and sworn to try the above-entitled cause, do hereby find that *the full market value of defendants* J. H. Gallagher, Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt's *interest in 1.8 miles of road* leading to the Santiam Bar and including damage to their interest in said bar, which interest exists under a contract from Crown Zellerbach arising from this proceeding as of June 18, 1942, was and is the sum of One Thousand Dollars ($1,000), said roadway crossing, among other lands, a tract formerly owned by L. M. Gossler and Alta L. Gossler, his wife. [Italics supplied.]

A motion for new trial was filed in that case by Gallagher and the McNutts. Judge Fee rendered an opinion on April 2, 1945, denying a new trial (R. 78, 60 F. Supp. 971). Judgment on the verdict was entered for $1,000, with interest at 6% per annum from June 18, 1942, until paid (R. 82–88). The sum of $1,155 was deposited, and final judgment was entered ordering payment of the money to J. H. Gallagher and Belle K. Gallagher, his wife, and Earl L. McNutt and J. Ira McNutt, "in full satisfaction of said judgment and of all claims against the United

States of America for the taking of the estate above set forth in and to the above described lands," and vesting in the United States "full fee simple title" in and to the Gossler tract (R. 89–96), and such payments were received by the plaintiffs in the present suit (R. 50, 96).

The present suit was instituted on August 23, 1946, to recover damages for the use of the portion of the road located on the Crown Zellerbach property (R. 2–4). The judgment in the condemnation case was pleaded in the answer filed in the instant case (R. 27–30), and the United States filed a motion for judgment on the pleadings, based upon the plea that the former judgment constituted a bar to this action (R. 30–31). The court reserved its decision on the motion to the time of trial (R. 32).

At the trial of this case, before Honorable Claude McColloch, appellees offered evidence as to the cost of construction of the road, which was admitted over appellant's objection (R. 123); expense to McNutt Brothers for the work they did on the road, $7,500 (R. 123–125); cost of easements from Crocker and Gossler to build the road $1,190, and cost to Gallagher in building the pioneer road, over which the permanent road was constructed, $1,500 (R. 127). Appellees also offered evidence to prove that a reasonable royalty for hauling over the entire road, 1.8 miles, was ten cents a cubic yard (R. 129). This value was testified to by appellee Gallagher, who stated that his opinion was based upon his contract with Strong and McDonald in 1942. That contract contemplated the hauling of 30,000 cubic yards of sand and gravel for

a lump sum payment of $3,000, but Gallagher stated that Strong misrepresented the amount and hauled 68,000 cubic yards for that amount (R. 127–128). The Government's testimony placed the value of hauling over the six-tenths of a mile of the road located on the Crown Zellerbach property at two cents a cubic yard (R. 145).

On April 4, 1947, the court made findings of fact (R. 46–52), summarizing the above facts, and made the further finding that appellees' claim for the reasonable and fair market value of the use by the Government of the road was not submitted, considered or fully decided in the condemnation action relating to the Gossler land; that appellant was fully advised of appellees' interest in the road at the time it hauled 66,643 cubic yards of sand and gravel over it, and that appellant's use was not made under a claim of ownership thereof. The court concluded that appellant did not acquire ownership of that portion of plaintiff's road which was constructed upon the land owned by Crown Zellerbach Corporation; that appellees had a valid claim against appellant for the reasonable and fair market value of its use for hauling 66,643 cubic yards of sand and gravel over the road; that there was an implied contract to pay the reasonable and fair market value of the use thereof, and that judgment should be entered against appellant for $5,816 (R. 53–54). The court filed the following memorandum opinion (R. 41):

> It is doubtful, as Government counsel conceded at the trial, whether former adjudication bars the plaintiff. This leaves the equitable plea

of estoppel for consideration. I think it is not inequitable for plaintiff to recover his cost less sums and credits previously received. That figures out:

Cost		$10,190.00
Less McDonald	$3,000.00	
Verdict Gossler case	1,000.00	
Plaintiff's own use	374.00	
		4,374.00
Judgment herein		$5,816.00

Judgment was duly entered and the Government took this appeal (R. 62).

STATEMENT OF POINTS RELIED UPON

The points relied upon by the United States (R. 64–65) are:

1. The district court erred in not holding that the entire interests of the appellees in the road were adjudicated in the condemnation action, *United States* v. *Gossler et al.,* Civil No. 1729, and that they are estopped from maintaining this action for the fair market value of the use of the road.

2. The district court erred in holding that the claim presented herein for the reasonable and fair market value of the use by the Government of the road belonging to appellees was not submitted, considered or fully decided in the case of *United States* v. *Gossler et al.,* Civil No. 1729.

3. The district court erred in holding that the appellees have a valid claim against the United States for the reasonable and fair market value of its use for hauling 66,643 cubic yards of sand and gravel over the road.

4. The district court erred in rendering a judgment in favor of appellees based on the cost of construction of the entire road, less the amount previously received for the use, as the reasonable and fair market value of the use of one-third of the road for hauling 66,643 cubic yards of sand and gravel.

5. The district court erred in admitting evidence of the construction cost of the entire road. The evidence and the objection appear at R. 123, in the testimony of Mr. Quigley, a witness for plaintiffs, as follows:

> Q. Are you familiar with the cost of constructing the road, insofar as McNutt Brothers are concerned?
>
> A. That is right; I am.
>
> Q. What was the cost to McNutt Brothers of the work that they did on the road?
>
> Mr. TWINING. I object to that, if your Honor please. I think this question is immaterial. There is no question here about the value of this road. It is not within the realm of the complaint and the pre-trial order. The whole thing is immaterial.
>
> The COURT. How are you going to approach it? I suppose it could be done on a footage basis.
>
> Mr. DEZENDORF. My theory is to show, first, the cost of the road, because I do not think it is practical to break down the cost of any particular part. My theory is that the cost of the whole road is the measuring stick which was laid down by the Crown Zellerbach Corporation and that that must be the measuring stick in this case. I understand the Government has a different theory.

The COURT. Admitted, subject to objection.

Q. (By Mr. Dezendorf): What was the expense to McNutt Brothers for the work that they did on the road?

A. $7,500.

6. The district court erred in ignoring the undisputed evidence that the portion of the road included in the pleadings could not have cost in excess of $3,000.

7. The district court erred in giving judgment of $5,816 for the use by appellant in hauling 66,643 cubic yards of sand and gravel over six-tenths of a mile of road.

ARGUMENT

I

Appellees' interests in the entire road were adjudicated in the condemnation action, and they are estopped from maintaining this action for the fair market value of the use of a portion of the road

When the matter of fixing the value of appellees' interest in the section of their private road constructed over the Gossler land came before the court in the condemnation case, the parties entered into a stipulation "to try, all in this one lawsuit, the value of the road and of our interest in the gravel bar" (R. 76–77). At that time the court stated:

> Well, that relieves the Court of some of the responsibility, because with this stipulation I take it that the parties can stipulate to try any questions that they want to. This is a stipulation to try out certain questions which may not technically be in the case, and I shall treat it as that (R. 76–77).

The court read the form of the verdict to the jury, which instructed them to find the full market value of appellees' "interest in 1.8 miles of road leading to the Santiam Bar and including damage to their interest in said bar." They rendered their verdict accordingly. In Judge Fee's opinion on the motion for new trial, 60 F. Supp. 971, 976, he called attention to the fact that after instructing the jury that the Government took the Crocker and Gossler lands and that the United States is required to pay just compensation therefor, he then instructed the jury as to the meaning of just compensation and fair market value, and added:

> However, the theory of the defendants as the case developed at trial, extended far beyond compensation for such property interest. Briefly, it was that the United States must compensate defendants not only for these property interests but also for the failure of defendants to make a profit upon an apparent demand in the vicinity for gravel at the date of taking. * * * The court said in part:
>
> "Now, in this case I instruct you that there was no taking of sand or gravel by the Government, and you are not to allow any compensation for sand or gravel * * * Neither will you consider the possible profit that might have been made in the sale of any sand or gravel, because there was no sand or gravel taken, and the Government is not required to pay for loss of a business proposition to anyone.
>
> "The sole consideration for you is the fair market value of the Gallagher and McNutt property interests."

> The court defined the property interests of defendants very broadly so that *they included not only the whole right of way,* but also the incorporeal right to take sand and gravel so far as connected therewith. The United States does not complain of this. The defendants cannot.
>
> * * * * *
>
> Actually the court assumed that defendants would not be fairly compensated for their interest in this roadway across the Gossler lands unless the entire strip commencing at the gravel pits on Crown-Zellerbach lands and running to the county road, were evaluated. [Italics supplied.]

In the trial of the present case, the court had the entire record in the condemnation case before him, and Judge Fee's opinion on the motion for new trial, and it is difficult to understand how he could find that all of the interests of the parties were not settled in that case.[2] It is well settled that a cause of action finally determined between the parties on the merits by a court of competent jurisdiction cannot again be litigated by new proceedings before the same or any other tribunal. *Baltimore Steamship Co. et al.,* v. *Phillips,* 274 U. S. 316 (1927); *Hummel* v. *Equitable Life Assurance Society,* 151 F. 2d 994 (C. C. A. 7,

[2] In the instant case the court made a finding of fact that the plaintiffs' claim herein was not submitted, considered or fully decided in the condemnation action (R. 52). This is in truth, we submit, a question of law as to the effect of the condemnation judgment. In any event, the facts which appear from documentary evidence and the pre-trial agreement of the parties cannot support such a finding.

1945); *Viles et al.*, v. *Prudential Insurance Co. of America,* 124 F. 2d 78 (C. C. A. 10, 1941), cert. den. 315 U. S. 816; *Boundary County, Idaho, et al.*, v. *Woldson,* 144 F. 2d 17 (C. C. A. 9, 1944), cert. den. 324 U. S. 843; *Runyon* v. *Great Lakes Dredge & Dock Co.,* 141 F. 2d 396 (C. C. A. 6, 1944); *Bennett et al.*, v. *Commissioner of Internal Revenue,* 113 F. 2d 837 (C. C. A. 5, 1940). The judgment in the condemnation action, being upon the merits, between the same parties as in the present action, the parties stipulating that they would try the whole matter in that one lawsuit, and that the jury should determine, the interest of the appellees in the entire 1.8 miles road and also the value of their interest in the Santiam Bar under their contract with Crown Zellerbach Corporation, constitutes a bar to the present action. In that case, a specific material fact was adjudicated: the interest of the parties in the entire road and the gravel bar, as of June 18, 1942. Therefore, that adjudication bars them in the present action from asserting a claim for the value of the use of a part of the road by the Government after that date.

In *Cromwell* v. *County of Sac,* 94 U. S. 351 (1876), the leading case upon this subject, it was held that where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. It seems clear that whether it be called *res judicata* or estoppel, the jury having determined the

interest of appellees in the entire road to be worth $1,000 and the judgment of the court being for that amount, the court in the instant case was bound by that adjudication and could not find the value for the use of one-third of the road for two years to be more than the full value of the road. The finding by the jury that the entire interest of appellees in the road and gravel beds was $1,000 is conclusive upon appellees, and since they have received that amount they are entitled to nothing more.

Apparently, the theory of the district judge in the present case was that this was a cause of action for the use of the road and the former case was for the value of the road. The test of whether this is the same cause of action is: could plaintiffs bring two causes of action, one for the value of the road and the other for the value of the use of the road? The district judge seems to answer this in the affirmative, but it is very apparent that when the Government paid the value of the road, it also paid for the use thereof, hence two actions could not be brought. *Winters* v. *Bisaillon,* 153 Ore. 509, 57 P. 2d 1095 (Ore. 1936). Certainly in the present circumstances, there is no difference between taking the road and taking the use of the road. Similarly, in cases when the Government condemns property for temporary occupancy, rather than in fee simple, the compensation for the rental value has been referred to as "market rental value of the temporary occupancy taken" (*United States* v. *General Motors Corp.,* 323 U. S. 373, 382–383), or "the fair market value of the use" (*United*

States v. *14.4756 Acres of Land in Christiana Hundred,* 71 F. Supp. 1005, 1008 D. Del. 1947). The identity of the two actions would be obvious if the condemnation proceeding had involved all three parcels. The fact that only the Gossler property was involved in the condemnation proceeding does not change the result, since the parties stipulated, as was only reasonable in the circumstances, that the claim for the entire 1.8 miles of road should be tried as a unit.

It cannot be said in support of the present judgment that the court in the condemnation proceeding lacked jurisdiction to determine the entire claim, for at least two reasons: First, appellees having consented to such procedure, not having appealed from the judgment, but instead having taken the proceeds thereof, cannot be heard to attack the proceeding. *United States* v. *Nudelman et al.,* 104 F. 2d 549 (C. C. A. 7, 1939), certiorari denied 308 U. S. 589. Secondly, the road obviously had to be treated as an entity and could not be broken down into the various segments. Thus, if the taking by condemnation of the part of the road over the Gossler land depreciated the usefulness and value of the six-tenths of a mile of the road on the Crown Zellerbach property, the owners were entitled to compensation for the damage to this remainder. *United States* v. *Welch,* 217 U. S. 333 (1910); *United States* v. *Grizzard,* 219 U. S. 180 (1911); *United States* v. *Chicago, B. & Q. R. Co.,* 82 F. 2d 131 (C. C. A. 8, 1936), cert. den. 298 U. S. 689; *United States* v. *Miller,* 317 U. S. 369 (1943). After such damages

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were paid, all that was left was, at most, the bare legal title to a worthless easement.[3]

II

In any event, the trial court erred in rendering a judgment based on the cost of construction of the entire road, less the amount previously received for the use, as the reasonable and fair market value of the use of one-third of the road for hauling 66,643 cubic yards of sand and gravel

A. *The construction cost of the entire road is not the proper measure of damages for the use of one-third thereof.*—Even if it be assumed that appellees are not barred nor estopped by the former judgment, the proper measure of just compensation was the fair cash market value of the use of the road at the time such use was taken. The judgment based upon construction costs has no relationship to market value. If the United States had hauled 100 or 1,000,000 yards of sand and gravel, it can be assumed that the judgment under that method of calculation would have been the same.

In the Court's opinion on motion for new trial in the condemnation case, 60 F. Supp. 971, 976, it said:

> Improper measures of compensation such as the cost of the road on the granted right of way were entertained. Instructions embodying variations of these ideas were asked for and refused. The motion for new trial is based in

[3] Appellees were not entitled even to nominal damages, because nominal damages are not recoverable under the Tucker Act. *Marion, Etc. Ry.* v. *United States*, 270 U. S. 280, 282 (1926).

part upon this refusal which it is claimed constituted error of law.

In the trial of the instant case, appellees were permitted to introduce evidence as to the cost of the entire 1.8 miles of road, to wit, $10,190 (R. 125, 127). This amount included $1,190 which was paid for easements across the Crocker and Gossler tracts, and could not have been a part of the cost of the part of the road on the Crown Zellerbach land. Thus, the testimony was that the actual road construction was $9,000 and that the part crossing the Crown Zellerbach tract, the only portion included in the pleadings and pretrial order in the present case, was $3,000, since appellees' testimony was that all portions of the road cost relatively the same amount (R. 126). It is clear that the court based its judgment upon this testimony. This evidence is, of course, evidence of the cost of two sections of road not within the pleadings, and the entire cost was expended at a time several months prior to appellant's use of the Crown Zellerbach portion of the road. This is not evidence as to the reasonable value of the road at the time appellant made use of it, nor is it evidence of the fair and reasonable value of appellant's use.

Appellee, Gallagher, testified that the Crown Zellerbach portion constitutes one-third of the road (R. 130–131); therefore, from his testimony of the cost of the construction of the entire 1.8 miles, the construction cost of this one-third could not be in excess of $3,000, and the maximum recovery, even on the

court's theory of valuation, would be $3,000 less credits already received thereon,[4] as follows:

Cost of one-third of road		$3,000.00
Less credit from Strong & McDonald	$1,000.00	
Less credit appellees' own use	124.66	
Less credit from Gossler case, ⅓ judgment with interest	385.00	
		1,509.66
		$1,490.34

These considerations make it clear that while the court rejected the claims of res judicata and estoppel, apparently on the ground that this is a different segment of the road from that involved in the condemnation case, yet in arriving at the amount of its judgment it valued the entire road and not just the segment on the Crown Zellerbach land. We submit that appellees may not in this manner secure an additional award for the segment of the road which they have already been paid for in the previous case.

Moreover, it is well settled that the Fifth Amendment does not guarantee a return upon the owner's investment and that, therefore, compensation cannot be measured by cost of the property taken. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266 (1943); *Kinter* v. *United States,* 156 F. 2d 5 (C. C. A. 3, 1946).

B. *The proper measure of recovery under the Tucker Act for the use of six-tenths of a mile of the road would be a reasonable hauling charge per cubic yard.*—Appellees testified that a fair, reasonable haul-

[4] The court's own computation is erroneous, since it failed to deduct the interest of $155 which was paid on the judgment, as one of the credits from the cost of construction of the road.

ing charge per cubic yard on this particular road, under the conditions in that community and the prices prevailing would be ten cents per cubic yard over the entire 1.8 miles of road (R. 129–130). This would make the charge 3⅓ cents per cubic yard over the .6 mile of the road on the Crown Zellerbach land. Appellant's witness, Mr. Shull, testified (R. 145):

> I would say two cents a yard would be a fair royalty, on just that short section of six-tenths of a mile.

The result of the court's judgment in this case is to charge the Government almost nine cents per cubic yard for the use of the entire road, and only one-third of the road was before the court. This is not supported by the evidence, as was just pointed out. Moreover, Mr. Forsman, who was Assistant Executive Officer of Camp Adair, during the time the road was used by the Army, testified (R. 132–133) that when the Army started using the road in October 1942, it was in poor condition and the Army had to rebuild it before it could begin hauling gravel for the Camp as there had been a flood, and that the Army maintained the road during the time it hauled the 68,000 yards of gravel. Appellees cannot rely upon their contract with Crown Zellerbach to support the present judgment, as they attempted to do in the court below (R. 80–81). That contract provides that Gallagher should be reimbursed "on some reasonable basis for the use of such private roads; such reimbursement to be at a reasonable royalty rate on a per-cubic yard basis which would not be greater than a fair share or

proportionate cost of constructing and maintaining such private road or roads." Thus, the contract provides for a reasonable price per cubic yard, with a maximum limit of recovery of the cost of the road. Since the royalty basis would only result in an award of some $2,221.00, based on Gallagher's own valuation of ten cents per cubic yard, it cannot support the judgment of $5,816.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Respectfully,

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